

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

IN RE: . Case No. 10-93904-BHL-11
. .
. .
EASTERN LIVESTOCK CO., LLC, . 110 U.S. Courthouse
. 121 West Spring Street
. New Albany, IN 47150
. .
Debtor. . February 13, 2012
. 10:10 a.m.

TRANSCRIPT OF TELEPHONIC HEARING
BEFORE HONORABLE BASIL H. LORCH, III
UNITED STATES BANKRUPTCY COURT JUDGE

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1 THE COURT: Good morning. Be seated.

2 UNIDENTIFIED ATTORNEY: Good morning.

3 UNIDENTIFIED ATTORNEY: Good morning.

4 THE COURT: All right. We're on the record in both
5 the Eastern Livestock and in the Gibson matters. Would the
6 attorneys state the appearances for the record, please?

7 MS. HALL: Terry Hall, Kevin Toner, Wendy Ponader,
8 and Sean White for the debtor, and we have Jim Knauer from the
9 trustee.

10 MR. LaTOUR: Good morning, Your Honor. Randall
11 LaTour from Vorys, Sater. With me in the courtroom is Kent
12 Britt and Melissa Giberson from my office. I wonder if I could
13 ask an indulgence. I'm fighting a vertigo problem, and I
14 wonder if it would be a problem if I address the Court while
15 seated?

16 THE COURT: That would be quite all right.

17 MR. LaTOUR: Thank you, Your Honor.

18 MR. LOVELL: John Lovell for Cactus Growers.

19 MR. DONNELLON: Dan Donnellon for First Bank & Trust.

20 MR. ROGERS: John Rogers and, also, Chris Trapp here
21 on behalf of Superior and Joplin.

22 MR. BOWLES: Claude Bowles, Bingham Greenebaum Doll
23 on behalf of Superior, Joplin and all the other creditors. We
24 have two thousand nineteen. It would take a half hour to read

1 it. Also, from my office, John Ames, Steve Graham and Ivana
2 Shallcross. (indiscernible).

3 MS. CARUSO: Debbie Caruso, Your Honor, representing
4 the Trustee Kathy Pry.

5 MS. LALLY: Elizabeth Lally appearing for Trustee
6 Kathy Pry.

7 MS. DelCOTTO: Good morning, Your Honor. Laura Day
8 DelCotto representing a number of different unpaid sellers.

9 THE COURT: Well, we don't have many paid ones here.
10 (Laughter)

11 MR. LEVIN: Elliott Levin, Your Honor, I'm with the
12 same office John Rogers.

13 THE COURT: I thought maybe you were.

14 MR. STOSBERG: Good morning, Judge. Andrew Stosberg
15 on behalf of Willie Downs.

16 MR. MEYER: Rob Meyer for Rosenbaum Feeder Cattle
17 LLC.

18 MR. OYLER: Mike Oyler, Your Community Bank.

19 MR. HOARD: John Hoard, Kathryn Pry, Your Honor.

20 MR. KING: Ed King, Fifth Third, Your Honor.

21 COURT CALL OPERATOR: Joining the meeting

22 THE COURT: All right. I already have a list of the
23 attorneys that are appearing by phone. I think maybe someone
24 just joined. Who just joined?

25 MR. LeBAS: It's Dave LeBas.

1 THE COURT: Okay. Do you have that?

2 COURT CLERK: Yes.

3 THE COURT: All right. I believe we want to take a
4 matter in Gibson first, and what would that be?

5 MS. CARUSO: Thank you, Your Honor. We are
6 addressing today the application filed by the trustee, Kathy
7 Pry to hire the Law Firm of Rubin and Levin, specifically Mr.
8 Hoard and Ms. Lally, to prosecute, to investigate and to
9 prosecute preference actions, Your Honor. If I may -- and
10 there have been two objections filed. One was filed by the
11 trustee for the Eastern case and one was filed by Fifth Third
12 Bank.

13 Your Honor, I do not believe we need to address the
14 fact that these are very complex cases that will inevitably
15 involve some avoidance actions. I do not believe we have to
16 address the fact that the trustee has the duty to investigate
17 these potential cases, and I do not believe we need to address
18 the fact that Rubin and Levin is eminently qualified to perform
19 an investigation and to prosecute any cases that would have to
20 be prosecuted, nor do I believe we need to address the fact
21 that their fee arrangement is reasonable.

22 So, let's get right to the objections. The
23 objections, basically, involve the facts that Rubin and Levin
24 is representing two creditors of the Eastern case; one is
25 Superior Livestock and the other one is Joplin.

1 Rubin and Levin also is representing the trustee of
2 East-West Trucking. So, the argument is that creates a
3 conflict in the Gibson case. Joplin, Superior and East-West
4 Livestock have not filed any claims in the Gibson case.
5 Superior has filed a financing statement against Mr. Gibson,
6 but has not pursued any action with respect to that financing
7 statement or asserted any right to any assets in the case.

8 Pursuant to Rule 1.7(a) of the Indiana Rules of
9 Professional Conduct, conflict waivers have been signed. The
10 East-West Trucking Trustee has signed a conflict waiver,
11 Superior has signed a conflict waiver and Kathy Pry, the
12 trustee has signed a conflict waiver.

13 Joplin has not asserted any type of an action or
14 claim, whatever, in the Gibson case. I, also, believe that
15 satisfies, Your Honor, Rule 326 of the Bankruptcy Code and that
16 Rubin and Levin is disinterested in the Gibson case. If, in
17 fact, they're -- and I think part of the objection is that
18 preference actions may be brought against Superior in the
19 Eastern case, and that perhaps Superior would file some sort of
20 claim in the Gibson case, even though the bar date has passed.
21 To the extent that would happen, Your Honor, my firm will
22 handle all matters with respect to Superior, a review of any
23 claim that would be filed and also any objections that would be
24 filed.

25 Another objection that has been asserted -- well,

1 there's a lot of fighting. If you notice the Gibson Estate has
2 not been involved in the fray, Your Honor. We don't have a dog
3 in that fight. And I think that it is very conceivable that
4 Rubin and Levin, which they're just doing avoidance actions.
5 They will not do investigating claims against the Third Bank,
6 they will not pursue any claims against the Third Bank. They
7 will not invest claims against Superior. They will not pursue
8 claims against Superior. So -- and there was an argument that
9 Superior has the goal --

10 THE COURT: So, that I understand that they'll be
11 limited to the avoidance actions.

12 MS. CARUSO: Right. And there's been 143 that have
13 potentially been identified, so there's a lot of work involved
14 here.

15 THE COURT: All right. But, that creates a fiduciary
16 responsibility to the Gibson Estate.

17 MS. CARUSO: That's right.

18 THE COURT: All right. So, do they want -- would
19 Rubin and Levin then want Eastern to prevail in terms of a
20 claim that it might have against the Gibson Estate, or would
21 they not want Gibson or Eastern to prevail, or do they not
22 care? Can they be neutral in that?

23 MS. CARUSO: Well, yes. Well, let me answer it this
24 way. Kathy Pry, the trustee, would want Mr. Knauer to prevail
25 to the extent it was going to create dollars in the Eastern

1 Estate that would flow through to the Gibson Estate.

2 THE COURT: Which would mean that she would want
3 Superior to fail.

4 MS. CARUSO: But, I don't think it matters, because
5 Superior has not filed a claim in the Gibson case. Superior is
6 not involved in any litigation.

7 THE COURT: But, if Superior wins on a forward
8 contract theory --

9 MS. CARUSO: Right.

10 THE COURT: -- then there's a lot of money that is
11 not in the Eastern Estate.

12 MS. CARUSO: Which will probably never get to our
13 case because they're going to try to subordinate Mr. Gibson's
14 claim, and I think it would kind of be silly to think that's
15 not going to happen, but, Your Honor, let's assume that
16 happens. It doesn't matter because --

17 THE COURT: Well, let's go back. Before we assume
18 that's going to happen, I mean, that is one good point, is that
19 does Gibson really have a valid claim against Eastern, or do
20 most of the claims flow the other way?

21 MS. CARUSO: Well, Your Honor, we filed the proof --
22 Your Honor, I'm not going to sit here today and say we don't
23 have a valid claim. We filed the proof of claim as a
24 protective measure. It was a bar date. I fully anticipate
25 they will ask the subordinate to claim and they will object to

1 the claim. But, even if we have a claim, and even if I do not
2 think it's a problem that Rubin and Levin will be representing
3 Superior in litigation, the trustee --

4 THE COURT: But, what about the fact that Superior
5 objects to the preference protocol suggested in Eastern, are
6 they going to come in with a similar protocol in the Gibson
7 case? I mean, it's --

8 MS. CARUSO: They're not a creditor. I mean,
9 Superior is not a creditor in the Gibson case.

10 THE COURT: No, no, I'm talking -- no, I'm saying the
11 firm. The firm -- I forget who signed it on behalf of Superior
12 or Mr. Bowles, but Rubin Levin is co-counsel for Superior. And
13 one of the objections is, for example, if I recall, that this
14 is, in effect, a confidentiality request to not have to divulge
15 amounts of settlements, which is, that I recall, I've done
16 things like that before to try to enhance settlement
17 negotiations because if somebody knows that they only paid 50
18 percent to settle this claim, they're never going to pay more
19 than -- offer more than -- that sort of thing. I assume you'll
20 be doing something like that in Gibson, or maybe you'll want
21 every settlement you reach in Gibson posted publically, I don't
22 know.

23 MS. CARUSO: You know, Your Honor, I haven't come
24 across any facts that would ask us to make those settlements
25 happen, but we might. But, I'm still having a problem seeing

1 how that would connect with Rubin and Levin's responsibility in
2 the case to pursue unrelated preference actions and --

3 THE COURT: It's a step removed. I'll grant you
4 that. But, it's -- I mean, not that I've never seen law firms
5 take different positions in different cases. I've seen that
6 before.

7 MS. CARUSO: Well, can I -- I tell you, as least, the
8 trustee wanted to hire Rubin and Levin and Mr. Hoard and Ms.
9 Lally, and it didn't really come on my recommendation. They
10 were my counsel as trustee in the Champ Car (phonetic) case,
11 and they did an exemplary job, probably one of the best jobs
12 that I've seen a firm do in pursuing avoidance actions, and we
13 returned 40 percent to the creditors. They're good and they're
14 -- you look at all these lawyers on this case on both sides,
15 there has to be some additional workforce other than myself and
16 Ms. Hannus (phonetic) to pursue these preference actions and,
17 you know, quite frankly, Your Honor, I don't know who's going
18 to do it --

19 THE COURT: Okay.

20 MS. CARUSO: -- \$175 an hour with a contingency fee
21 ceiling. If someone in this room wants to do it --

22 THE COURT: All right. Let us hear the objections.

23 MS. HALL: Well, Your Honor, I --

24 THE COURT: That I haven't already raised.

25 MS. HALL: We don't disagree that Rubin and Levin is

1 qualified. We don't disagree that you might have struck a good
2 deal. I do disagree that on behalf of the trustee somewhat
3 that the entire legal community in the State of Indiana has
4 been tapped out, and that the only people that can represent
5 conflicting parties in this case is Rubin and Levin.

6 I think that the trustee's primary concern is that we
7 already have severe litigation going on with Superior, probably
8 with Joplin. Rubin and Levin as counsel to Superior are going
9 to be tasked in the Gibson Estate with the fiduciary duty to
10 investigate the actions of Mr. Gibson with relation to his
11 creditors and the parties that he did business with, one of
12 which may have been Superior. And the trustee is aware of
13 transactions between Mr. Gibson and Superior that have not
14 possibly yet been disclosed among all the pleadings, and we
15 just believe that there is a conflict of interest related to
16 the same lawsuit -- the same law firm being involved in
17 specific litigation within the Eastern case, representing the
18 trustee in a related entity case that was owned by Mr. Gibson
19 and then now representing the Gibson Estate, related to
20 investigating the actions of Mr. Gibson and his creditors, and
21 contract parties and others who he did business with.

22 THE COURT: Well, tell me more specifically, how that
23 might put Rubin and Levin in a conflict situation.

24 MS. HALL: Well, I think that Your Honor brought up
25 one of which -- one of them is the relation to the objection

1 that they proposed to the preference protocols that this estate
2 has proposed, related to the preference protocols, or no
3 preference protocols that they may have related to the 147
4 cases that they've got going over there in the Gibson Estate.
5 We are going to be bringing preferences against Superior and
6 against Joplin, more than likely, and that's going -- those
7 parties are represented by Rubin and Levin.

8 MS. CARUSO: Your Honor, these are two separate cases
9 and they're large cases and lots of attorneys in this room have
10 conflict waivers. It's very difficult to find attorneys that
11 do not have some conflict with this case. Rubin and Levin will
12 not do anything related to Superior in the Gibson case. I will
13 do that. And might I say this, too, that the people that are
14 required to object have signed conflict waivers.

15 MS. HALL: Well, Your Honor, on that note --

16 MS. CARUSO: Or, I should say are tentative.

17 MS. HALL: If Rubin and Levin uncovers what's in
18 their preference investigation, material that is adverse to
19 Superior or that it is -- has to do with Superior or Joplin,
20 what are they going to do with it? Are they going to turn it
21 over to Ms. Caruso, so that she can then prosecute that on
22 behalf of the Gibson Estate against their clients?

23 MS. CARUSO: You know, I just --

24 THE COURT: So, wait a minute. I don't --

25 MS. CARUSO: -- don't think that's going to happen,

1 quite frankly.

2 MR. AMES: Your Honor, I may have a thought with
3 respect to what Ms. Hall just mentioned. She's bringing up the
4 issue of what if, and what if Eastern brings a sort of
5 avoidance action against Superior and/or Joplin. First of all,
6 it's our position that that's not going to -- that can't happen
7 for various reasons, but should they do and should they try, I
8 doubt if Rubin and Levin will be representing Superior at that
9 point. Rubin and Levin is here, in this case, as conflict
10 counsel for any actions that are directly pursuant to Fifth
11 Third, not against the Gibsons --

12 THE COURT: So, is Rubin and Levin's representation
13 of Superior -- and I understand this was the primary purpose of
14 it, initially, was the conflict that your firm had with Fifth
15 Third, right?

16 MR. AMES: Yes, sir.

17 THE COURT: Is that the limit of their representation
18 of Superior?

19 MR. AMES: Yes, sir. If the Court will notice, we've
20 been very, very precise in everything we say in court and in
21 our pleadings that Bingham Greenebaum Doll is representing
22 Superior Joplin in all matters other than those that directly
23 involve conflicts with Fifth Third.

24 UNIDENTIFIED ATTORNEY: Your Honor, while I --

25 THE COURT: Is that a new firm?

1 (Laughter)

2 MR. AMES: I had to think twice before I said --

3 UNIDENTIFIED ATTORNEY: Rubin and Levin is not a new
4 firm. It's the same old guys, okay.

5 THE COURT: No. I've heard of that one. I've heard
6 of that one.

7 MS. HALL: Your Honor, while I understand that that
8 may be the case represented in the court and the pleadings,
9 it's certainly not represented that way in the negotiations
10 that have been going on in this case, as to limitation of Rubin
11 and Levin's representation of Superior and Joplin only as
12 against Fifth Third.

13 MR. ROGERS: What do you mean by that?

14 MS. HALL: You know --

15 MR. ROGERS: It's not clear. It's just -- well, I
16 understand.

17 MS. HALL: Your Honor, this is -- okay, because now
18 you're just going to convince the judge that this stuff is
19 going to happen, okay. This is probably the last time you're
20 going to see Mr. Hoard and Ms. Lally in this courtroom with all
21 of these folks. You won't see them anymore in here. We're
22 going to do our preference actions and move on.

23 THE COURT: All right. Yes. I'll let the bank speak
24 and then let's move on.

25 MR. LATOUR: All right. Your Honor, the engagement

1 letter attached to the application indicates that Rubin and
2 Levin is being retained to pursue all Chapter 5 causes of
3 action. That does not square with the representation that
4 they're being retained for 187 identified preference actions,
5 nor was, in the proposed order, a limitation indicating that
6 they would not investigate Fifth Third, or otherwise be engaged
7 in analyses of actions against Superior, or against Joplin or
8 the other players. Now, I made --

9 THE COURT: So, if those changes were made in the
10 engagement letter would that satisfy your objections?

11 MR. LATOUR: It would satisfy my client's objections
12 as they relate to Fifth Third. I guess as an officer of the
13 court, the Court still has to ask itself, if Rubin and Levin
14 has an unlimited duty of loyalty to Superior its current
15 client, and has an unlimited duty of loyalty to the newly
16 proposed client, it doesn't matter whether they, themselves,
17 are prosecuting the action or not, the client is prosecuting
18 the action. And if the two clients' positions are
19 diametrically opposed, I believe that raises an irreconcilable
20 conflict.

21 If the Court decides that I'm wrong, fine, I accept
22 that. But, at that point, I would still want the limitation
23 that Rubin and Levin is not investigating Fifth Third, or in
24 pursuit of Chapter 5 causes of action that are different from
25 547 of the Bankruptcy Code because, as you just heard, they

1 were specifically hired by Superior to represent Superior
2 against Fifth Third. And I don't see any possible way they
3 could evaluate whether there are valid or invalid causes of
4 action against Fifth Third, wearing a different hat in a
5 different case.

6 THE COURT: All right. I'm going to take this under
7 advisement. I'll get you an order in a few days.

8 MS. CARUSO: Thank you, Your Honor.

9 THE COURT: Let's move on. Going back to the Eastern
10 agenda.

11 MS. HALL: The first item on the agenda, Your Honor,
12 under continued matters, is the motion to quash. I believe
13 that involves Mr. Donnellon and companion Your Community Bank.
14 Yes, no, motion to quash?

15 UNIDENTIFIED ATTORNEY: I guess Mr. Newbern.

16 MR. NEWBERN: No, Your Honor.

17 MS. HALL: I'm sorry, it's Mr. Newbern with
18 (indiscernible).

19 UNIDENTIFIED ATTORNEY: Yes.

20 MR. NEWBERN: Your Honor, this is Scott Newbern.

21 THE COURT: Yes, Mr. Newbern?

22 MR. NEWBERN: I've been in ongoing conversations with
23 the U.S. Attorney. We've reached agreement to continue this
24 matter. We're working towards resolving what is needed. I
25 proposed -- propounded, pardon me, the discovery on the trustee

1 two or three weeks ago. I anticipate that what I get back in
2 response to that will alleviate some of the requirements I have
3 on Gibson and, also, what may also be in the record that is, as
4 well, in the document file, document room.

5 It makes a lot of sense to put this off, since I
6 filed an agreed motion, the U.S. Trustee is in agreement with
7 this. That's where we're at.

8 THE COURT: How far out do you want to go, Mr.
9 Newbern?

10 MR. WHARTON: Your Honor, this is Chuck Wharton of
11 the U.S. Trustee. I think I perhaps Mr. Newbern meant the U.S.
12 Attorney's Office.

13 MR. NEWBERN: I believe I said -- I may have
14 misspoke.

15 MR. WHARTON: That's fine.

16 THE COURT: How far out do you want to go?

17 MR. NEWBERN: I think my motion asked for 60 days, 60
18 or 90, somewhere in there should be plenty.

19 THE COURT: Do we have another -- we have other
20 omnibus dates set.

21 COURT CLERK: Other than March 12 --

22 THE COURT: All right. Let's set some omnibus dates
23 beyond March 12th and then you can choose one that's 60 to 90
24 days out. Let me see.

25 MR. NEWBERN: Okay, Your Honor. Thank you.

1 THE COURT: I'll give you a date in just a moment.

2 I've got April 9th or April 23rd, any preference? Do
3 you think we need it as quickly --

4 UNIDENTIFIED ATTORNEY: 23rd, Your Honor.

5 THE COURT: All right. April 23rd we'll do an
6 omnibus. Did the -- the Gibson attorneys left, didn't they?

7 We have a trial scheduled in Gibson on the 14th of
8 April. I don't know if that's anticipated that's going to go.
9 How about the 21st of April? Oh, I've got a trial, excuse me.

10 MS. HALL: Are we talking April or May?

11 THE COURT: Oh, I'm sorry. May. How about May 14th?
12 That's a Gibson trial?

13 COURT CLERK: (Inaudible)

14 THE COURT: Well, if it is we'll have the trial after
15 the omnibus. So, May 14th and just so that we have some
16 scheduled, June 11th. So --

17 MR. NEWBERN: Your Honor --

18 THE COURT: Yes, go ahead.

19 MR. NEWBERN: This is Scott Newbern again. May 14
20 seems fine for purposes of continuing the first matter.

21 THE COURT: All right. I'll show that's continued to
22 May 14th.

23 MR. NEWBERN: Thank you, Your Honor.

24 THE COURT: Thank you. Then we have the motion to
25 compel the trustee to produce budgets and financial information

1 with a response filed the 8th saying that they were posted on
2 the website. I don't know if what's been posted is
3 satisfactory to the movant or not.

4 MS. DelCOTTO: Your Honor, what's been posted is the
5 current budget for the first quarter and that is fine, the
6 trustee still will not provide all past budgets. Whatever the
7 Court rules, I would still like to see those. I've been saying
8 that for a year and I just think -- I finally come to realize,
9 it took me a long time, I just have a very fundamental
10 difference of philosophy on Chapter 11 Trustee should be
11 transparent to all parties. And in my mind the fact that this
12 case is where it is today is partly because of the lack of
13 prior transparency, which has just created a number of
14 perceptions that might have been avoided.

15 So, I would still like to see all the budgets. I
16 believe all the litigants are entitled to those, so that's my
17 motion.

18 MS. HALL: Your Honor, we don't -- I don't think we
19 ever said we wouldn't post the past budgets. Maybe we
20 misunderstood that that's what -- and she wanted the budgets
21 that we had. I mean, the original DIP order had sealed the
22 budgets, and then decided to unseal them.

23 We were remiss. I forgot to have it posted after the
24 November hearing. If you want us to go back we'll post the
25 back budget. They look exactly like the current budgets.

1 THE COURT: Post the past budgets. I'll show the
2 motion is granted, to the extent that I'm ordering that the
3 past budgets be posted within 10 days.

4 MS. HALL: That's fine.

5 THE COURT: Motion to consolidate -- is that doable,
6 the ten days?

7 MS. HALL: Yes.

8 UNIDENTIFIED ATTORNEY: Yes.

9 THE COURT: All right.

10 MR. NEWBERN: It's me again, Your Honor, Scott
11 Newbern in Florida.

12 THE COURT: Yes, Mr. Newbern?

13 MR. NEWBERN: We have, before the Court an
14 interpleader in which (indiscernible), some of my unpaid
15 clients are being held and also a payment that was made into --
16 as purchase money into the trustee, both of those involve
17 substantially the same kinds of matters, identical
18 transactions, just different parties. The money wound up in
19 two different pots.

20 The interpleader is a natural adversary proceeding
21 in Wisconsin that has been assumed by the trustee under the
22 jurisdiction of this court. I ask that the other matter filed
23 which includes a payment by a Lynn Miller, and then there's
24 some residual issues regarding receivables on the trustee's
25 report that's being due, which actually represents payments

1 that bypass Eastern, once they failed to clear the transaction.
2 So, we're just trying to put all these issues in one pot.

3 I filed a motion after circulating it amongst trustee
4 counsel and the Fifth Third, as well. They generally agreed to
5 the consolidation of the claims, but when it came to my motion,
6 they disagreed with it being filed under Paragraphs 10 and 11.

7 I received an objection filed by the trustee, four or
8 five pages, and I replied to that with documents that I believe
9 the Court has it for under a motion to seal. Basically, I
10 think that we separated it in two parts. The consolidating of
11 the claims is agreed upon by the trustee and Fifth Third where
12 and what the litigation will follow and how it will track I
13 think is where the disagreement resides.

14 We contend that Eastern acted in a particular way in
15 Florida. The trustee disagrees, Fifth Third disagrees, and
16 that's the nature of how this case is going to get sorted out.
17 We also believe that --

18 THE COURT: Well, let me interrupt you for just a
19 second, here.

20 MR. NEWBERN: Yes, sir.

21 THE COURT: Yes, I think -- didn't you even in your
22 motion talk about claims against Fifth Third?

23 MR. NEWBERN: I don't believe so, Your Honor, though
24 we do have claims, we've made a demand on Fifth Third for bad
25 checks and some other reasons, but we hadn't filed any claims

1 or made claims against Fifth Third at this point. We -- in my
2 motion I talk in Paragraph 11 about some issues that are before
3 the Court that may come up if this issue regarding a clearing
4 status or some other rule, depending on how the court rules on
5 those matters. I think I talk about issues of subordination --

6 THE COURT: Right. That's exactly what I was
7 referring to.

8 MR. NEWBERN: Issues of constructive trust, I don't
9 consider those necessarily a claim against Fifth Third. That's
10 just my view. I apologize if that's wrong, Your Honor.

11 THE COURT: Well, you talk about subordinating their
12 claim, right?

13 MR. NEWBERN: Talk about subordinating -- yes, I
14 guess I did. You're right.

15 THE COURT: Yes.

16 MR. NEWBERN: It's only, it's only --

17 THE COURT: Well, let me just interrupt you, again,
18 and say, I don't know what we'll do as far as this
19 consolidation motion is concerned. Maybe we can resolve among
20 the parties. I mean, I'm in favor of consolidating any issues
21 that will help us resolve things just once and I want to talk
22 about some of those things as to other issues this morning. I
23 don't think this is -- we have a vehicle here that would
24 properly raise any -- I don't want to -- let me say it more
25 directly. We're not going to handle the subordination --

1 attempted subordination of Fifth Third's claim in this motion.
2 If we do that, if anybody raises that, that's going to be in an
3 adversary where everyone who thinks that ought to be done is a
4 party or has the opportunity to become a party, and I can
5 decide it once.

6 So -- and then somebody can appeal once, if they want
7 to, if everyone is not happy. So, why don't -- I think there
8 ought to be further discussions with the trustee as to this
9 motion, and I want to see if you all can reach some sort of
10 agreement as to -- and get me some sort of proposal, as to what
11 could be consolidated, and then at the next omnibus I'll rule
12 on any issues that remain.

13 MR. NEWBERN: Your Honor, I'm happy to do that, but
14 I'm a little confused because when I speak to the issues of the
15 constructive trust and subordination, they're only in the
16 context of they may be part, not necessarily of this one issue,
17 or this one consolidated piece, but simply issues raised across
18 the spectrum of all the cases.

19 THE COURT: Well, that's true and I've --

20 MR. NEWBERN: Separate claims by Florida creditors,
21 is simply another issue that's been raised. Constructive
22 trust perhaps become part of -- well, it's already an issue
23 before the Court and in another matter and --

24 THE COURT: Well, it's already an issue that I issued
25 an order on, on Friday, and that's one of the discussions that

1 I want to have this morning is, how do we then publish or
2 broadcast this order into other matters in this case, which by
3 short orders that say for the reasons set forth in the Court's
4 order of, whatever date that was, the Court enters this ruling
5 as to constructive trust?

6 MR. NEWBERN: I was unaware that you made a ruling on
7 constructive trust, Your Honor.

8 THE COURT: Yes. I'm against them. So -- and in
9 light of that, why don't -- I still think I'm going to continue
10 this matter to the next -- when is the next omnibus, March?

11 COURT CLERK: March 12th.

12 THE COURT: March 12th. I want you and the trustee
13 to have further discussions and the bank as to what -- I want
14 something in front of me on that day that specifically says
15 what can be consolidated, and then I want to talk to you on
16 that day, Mr. Newbern, about the you want consolidated that
17 they're opposing.

18 MR. NEWBERN: Yes, Your Honor.

19 THE COURT: All right. Thank you. The preference
20 avoidance protocols. Yes?

21 MS. PONADER: Good morning, Your Honor. Indulge me
22 for a moment. Sorry.

23 (Attorney conversation)

24 MR. DONNELLON: Your Honor, this is Dan Donnellon. I
25 know this isn't our agenda, but before you skip to the next

1 one, there was -- the Florida creditors also had a motion to
2 -- motion to seal reply. The way I read it is there's some
3 documents that are stamped confidential. The protocol says if
4 they're stamped confidential, you try to address it with each
5 other and determine whether that can be removed under the 7th
6 Circuit's Jessup standard --

7 THE COURT: Correct.

8 MR. DONNELLON: -- and I didn't want to just skip
9 over that part of the agenda, and it's Mr. Newbern's motion,
10 but it looked like, before we move on with Ms. Ponader, we
11 might want to, at least, see if that needs to be addressed
12 before the next omnibus.

13 MS. DelCOTTO: I have a very similar motion, so
14 whenever we're going to address that, Your Honor.

15 THE COURT: All right. Well, I think we can address
16 that pretty quickly. First of all, what's the trustee's
17 position? I mean, do you want these matters to remain, or the
18 bank's position to remain confidential?

19 MR. DONNELLON: I believe they're bank records, Your
20 Honor. The banks asserted confidentiality. The trustee
21 doesn't really have a position.

22 THE COURT: So, then the bank wants them to remain
23 confidential?

24 MR. LATOUR: Your Honor, the documents -- I'm not
25 entirely sure what the range of the documents that we're

1 talking about because I was unaware of what Mr. Newbern had
2 filed. And a number of the bank documents contain personal
3 information that under various privacy laws have to be
4 maintained as secret. The bank doesn't have a concern about
5 sharing those documents with the parties who have already seen
6 them, pursuant to the discovery protocol. Those parties have
7 already signed confidentiality agreements.

8 The concern would be letting the documents get out
9 into the public domain prior to having two filters applied.
10 One, to remove the personal information, the Federal Law
11 requires be redacted, and second of all, to not have the bank's
12 proprietary information released out into the public, how the
13 bank does business. So, in terms of sharing it amongst the
14 litigants that have signed the confidentiality agreement as
15 part of the --

16 THE COURT: Well, the litigants have it. I don't
17 think that's any -- I mean, they've attached them, or some of
18 the documents to motions they've filed with me and not filed
19 with the court, just brought to chambers. So, in other words,
20 you want them -- the bank's position is that you would still
21 like them filed under seal?

22 MR. LATOUR: Yes, sir.

23 THE COURT: All right. All right. I'm going to --

24 MR. NEWBERN: Your Honor?

25 THE COURT: Go ahead.

1 MR. NEWBERN: This is Scott Newbern. I -- the bank
2 documents that I've, specifically, attached in a reply include
3 no personal information, whatsoever. They are loan committee
4 kind of documents. There are some financial evaluations.
5 There are some issues regarding, some discussions regarding a
6 debtor or borrower.

7 THE COURT: I don't know that I've seen yours,
8 actually. The two that I looked at on Friday, I think, were
9 both filed by Ms. DelCotto in two different adversaries, right?

10 MS. DelCOTTO: That's right, Your Honor.

11 THE COURT: Those are the ones I saw. When did you
12 file yours Mr. Newbern?

13 MR. NEWBERN: The same day, Your Honor. They were
14 hand-delivered to your offices on Friday afternoon. Most of
15 the documents were similar to what Ms. DelCotto filed
16 (indiscernible). I'm not sure I have the same documents that
17 she has, but I think some of them are.

18 THE COURT: All right. Well, I think you missed me
19 on Friday because I didn't have a chance to look at those.
20 Yes?

21 MR. TONER: Kevin Toner for the trustee. I think
22 this does raise a, perhaps, recurring issue. When folks are
23 submitting things under seal, I'm not sure they're remembering
24 to serve the other parties in the adversary proceeding. We are
25 all subject to the confidentiality stipulation. We should be

1 able to see what Your Honor has seen and I don't believe I was
2 served with a copy of what Mr. Newbern has tendered.

3 MS. DelCOTTO: Your Honor, I did certify e-mail Mr.
4 Toner and Mr. LaTour only, because I'm not sure I know who all
5 is in the confidentiality protocol --

6 THE COURT: Right.

7 MS. DelCOTTO: -- and I did -- I was out. I did not
8 get a chance to speak to you. I spoke to Mr. LaTour and
9 actually with your ruling on Friday now about the 90 days for
10 evidence, I'm happy to table mine just as part of this global
11 discussion about what are we going to do. I mean, part of what
12 you just said is --

13 THE COURT: Well, that's why I thought is was ironic
14 that I saw this motion on Friday and I had already -- was
15 getting ready to issue the order and that's exactly the
16 conclusion I had come to before I saw this motion, that the
17 parties had a right to see more information regarding to the
18 Packers' and Stockyards' issue before making a determination.
19 So, I am going to table your motion, Mr. Newbern, and Ms.
20 DelCotto's two motions, to March 12th.

21 It sounds to me like Mr. LaTour might want to spend
22 some time with the documents, or someone in his office might
23 want to spend some time with the documents and see what we're
24 really talking about in terms of personal information and/or
25 bank information that he thinks should not be released. So,

1 I'd like the bank by March 12th to formulate -- if they
2 maintain an objection, to formulate a more specific objection
3 so that we can talk, specifically, about certain documents and
4 information in them, and I'd like Mr. Newbern and you to engage
5 in negotiations with the bank about that.

6 So, the bank's to do an initial review and then send
7 you a correspondence to say, here's what we don't like, and you
8 two see if you work that out before March 12th.

9 MR. NEWBERN: Yes, Your Honor. I believe I did serve
10 that, so we'll be able to work that out.

11 THE COURT: Okay. thank you.

12 MR. DONNELLON: Thank you, Your Honor. I apologize
13 to Ms. Ponader. I just wanted to make sure they were on the
14 agenda.

15 THE COURT: That's all right.

16 MS. PONADER: Good morning, Your Honor.

17 THE COURT: Good morning.

18 MS. PONADER: Wendy Ponader on behalf of James
19 Knauer, Trustee of Eastern Livestock.

20 Your Honor, in the 90 days prior to the filing of
21 this bankruptcy case, several hundred million dollars were paid
22 out by ELC to some 850 transferees. Among the duties of Mr.
23 Knauer as trustee of the Eastern Livestock Estate is to
24 investigate preference actions. As Mr. Knauer considered the
25 undertaking of investigating preference actions and the

1 constituency of the transferees in this case and the several
2 hundred number of the transferees in the case, he asked the
3 -- he asked counsel, if, with the help of DSI, we could look at
4 enough data to develop protocols for determination, as under
5 Rule 408, Your Honor, as to what likely preference defendants
6 under 547(c), these many transferees would have, because the
7 objectives, Your Honor -- I should say I'll address the
8 Superior objection after Mr. Ames speaks on behalf of Superior,
9 but his objectives, Your Honor, could not be more diametrically
10 opposed than those that -- of which Superior accuses the
11 trustee in this case.

12 His objectives were to fairly and sensibly do an
13 analysis of preferences to come up with and identify wherever
14 possible estimated net preference recovery on a basis that
15 would be uniform across the board, as a starting point. Yes,
16 he purposes to send those settlement letters out, Your Honor,
17 without a preview to the broader community as to what he is
18 purposing to settle at.

19 I will go through an analysis of how this trustee's
20 (indiscernible) will actually work because, frankly, Your
21 Honor, there is no absolute sort of overlay that one could
22 achieve here and we absolutely believe there would be an
23 opportunity for mischief if those settlements were made public
24 at any time. If, in fact, transferees are agreeing to settle
25 at the trustee's estimate of the (indiscernible) preference

1 exposure.

2 Certainly, Your Honor, if in fact, there is no
3 settlement reached and in accordance with the authority that we
4 ask the Court to grant to us today, the trustee will then
5 commence an action against the transferee. The assumptions
6 that the trustee will have made that are, as the Court will see
7 are largely and almost exclusively favorable to the transferee
8 and for the purposes of meeting the discrete objectives under
9 547(c) defenses, contemporaneous exchange, ordinary course and
10 subsequent new value, those transferees, in accordance with the
11 burdens of proof, as established by the Bankruptcy Code, will
12 indeed have to then prove those defenses and that is a new
13 burden that they will have. But, the trustee at the front end,
14 Your Honor, is working to minimize unnecessary cost to this
15 estate, unnecessary burden and concerns among the transferee
16 population, Your Honor, and to do this in a fair and sensible
17 way.

18 The reason, Your Honor, that we were able to identify
19 conventions is what the trustee has called them, Your Honor,
20 conventions that would likely in almost all instances arguably
21 constitute ordinary course, subsequent new value is because
22 these transferees overwhelmingly are made up of just two
23 categories of persons, Your Honor, cattle sellers and truckers,
24 and that's not to a person, Your Honor, but overwhelmingly the
25 largest number of transferees are cattle sellers. The terms of

1 sales in connection with these transactions, Your Honor, are in
2 most all cases identical, or were purported to be identical,
3 and the records of the company indicate that overwhelmingly,
4 the terms of the transfers were identical.

5 So, those similarities allow the trustee to identify
6 conventions as to what would constitute ordinary course in
7 connection with the sale by these cattle sellers to ELC of
8 cattle. Likewise, what would constitute in ordinary course
9 with respect to trucking companies, moving cattle at the
10 request of ELC to different feed lots.

11 I think probably, Your Honor, the next thing to do
12 here would be to go through some -- to go through the analysis
13 that the trustee undertook in a couple of fictional cases. I'm
14 sorry, I hope everyone can see. Your Honor, I'd like to --
15 let's do this first, okay. This is the fictional transferee,
16 Ponader Perry Farms. Ponader Perry Farms under this analysis,
17 Your Honor, received four transfers -- would you rather I be
18 closer to you, or are you okay?

19 THE COURT: I'm all right.

20 MS. PONADER: Ponader Perry Farms under this analysis
21 would have received four transfers from the estate in the 90
22 days prior to filing. The aggregate of those transfers would
23 have been \$450,000 in that 90-day period. The ordinary course
24 convention, or assumption the trustee for the purposes of his
25 analysis, in connection with Ponader Perry Farms was that a

1 payment made in connection with the purchase of cattle, where
2 the check was delivered to the seller on the date of the
3 delivery of cattle, or within one business day thereafter,
4 would indeed constitute a likely ordinary course defense, and
5 the trustee is, for the purposes of settlement under these
6 letters that the trustee is proposing to send, will give the
7 transferee the benefit of that assumption. Again, under Rule
8 408, that would have to be proven at trial if no settlement is
9 forthcoming.

10 But, for the purposes of seeming to systematically,
11 efficiently, and fairly collect preferences with minimal cost
12 to the estate and, frankly, also, Your Honor, with minimal
13 difficulties, alarms, concerns, burdens to the transferees, if
14 everybody understands preferences have to pursue, this
15 convention where ordinary course for the seller of cattle for a
16 payment that's made within one date, one business day delivery
17 appear to be an appropriate ordinary course for Ponader Perry
18 Farms.

19 So, you see that a delivery date in this case
20 occurred on September 9, 2010. The check date is dated
21 September 9, 2010 and the clear date is September 16, 2010.
22 This transfer would have met the protocol of the trustee and
23 over the \$150,000 transfer (indiscernible) exposure of that
24 transfer is zero. One week -- just a few days later, September
25 15, 2010. Your Honor, the check date wasn't until September

1 18, 2010. The trustee looked at the calendar, September 15 is
2 a Friday. One business day, thereafter, would be Monday
3 September 18, indeed, this transfer of \$100,000, where the
4 check date is September 18, 2010 and the clear date within a
5 reasonable time thereafter. As Your Honor said, there's no
6 expectation of problems in terms of delivery of the check, and
7 time of delivery which would raise concerns in terms of the
8 reasonableness of the trustee's ordinary course assumption here
9 was not triggered. So, in fact, this \$100,000 transfer results
10 in a cumulative net preference exposure of zero.

11 We now look at a subsequent transfer October 11,
12 check date October 11, clear day the 19th, 18 days later,
13 ordinary course. This is a \$50,000 transfer, so after these
14 three transfers, during the 90-day period Ponader Perry Farms
15 would have already received \$300,000. There's -- Ponader Perry
16 Farms is still at zero cumulative preference exposure.

17 We get to the fourth transfer, October 15, this check
18 date, Your Honor, is not until October 19. This October 19th
19 check clearing on October 25, triggers the exposure where this
20 transfer would, in fact, not be consistent with the conventions
21 as established by the trustee after reviewing the data, and the
22 trustee would identify this transfer as creating cumulative
23 preference exposure. And because the prior transfer is zero,
24 this \$150,000 transfer, in fact, does result in exposure to the
25 Ponader Perry Farms at \$100,000. Thereafter, Your Honor, ELC

1 made one more transfer to Ponader Perry Farms, the check
2 bounced. The \$50,000 transfer you paid, we have Ponader Perry
3 Farms under the scenario has filed a proof of claim. We looked
4 at the check, we know it bounced, we will go ahead and apply
5 that subsequent value to reduce that -- the cumulative net
6 preference exposure and resulting -- mathematically in a
7 cumulative net preference exposure to Ponader Perry Farms,
8 \$700,000. So, this case Ponader Perry Farms will get a letter
9 saying, you've received \$450,000 in transfers. We looked -- we
10 had done an analysis, we've made assumptions favorable to you,
11 we will settle at \$100,000.

12 Certainly, in view of Ponader Perry Farms is that it
13 does not want to settle at that sum, it can decline and the
14 trustee will go ahead and initiate the action, and consistent
15 with its responsibilities say any further settlement
16 negotiations are resolved in that case will be subject to the
17 Court's review.

18 THE COURT: All right. Before you go on, that's very
19 good preference analysis and I think I taught it almost exactly
20 that way last semester, but what do you need from me?

21 MS. PONADER: Your Honor, the trustee is doing
22 something somewhat irregular here. Normally, you would expect
23 the trustee to be sending letters out to 800 plus transferees
24 with a demand, and Ponader Perry Farms would have gotten demand
25 for \$450,000, and Ponader Perry Farms would have engaged a

1 lawyer. They would have paid someone to do the analysis I just
2 went through with you, and would have come back and said, no,
3 we think that Ponader Perry Farms only gets exposure of
4 \$100,000.

5 THE COURT: Correct. That's normally how it happens?

6 MS. PONADER: That would be normally how it happens.

7 The trustee wants -- would like you, Your Honor, and this court
8 to go ahead and approve settlement at the trustee's calculation
9 of the estimated net exposure of this case. This is not -- and
10 the reason that we are asking for approval of the settlement at
11 this level, not after we compiled a preference action, Your
12 Honor, but in connection with a demand letter, is because as
13 you will see as we go through these other analysis, we have
14 widely disparate percentages of recovery here because exposures
15 are widely disparate. There are preference (indiscernible),
16 Your Honor, and I will tell you we are running well over half
17 that based on what the trustee knows now in this case as to the
18 analysis, there will be no demand at all, and no expectation of
19 demand. And frankly, at this point, no expectation of a
20 preference action to be initiated, unless and until during the
21 next eight months in this case, up to the point of -- or ten
22 months, excuse me -- up to the point of the statute of
23 limitations period, we, the trustee learns of information that
24 causes him to rethink the some of the assumptions we would have
25 made that wouldn't have up til that point essentially insulated

1 that transferee from having a demand made, and certainly a suit
2 filed thereafter.

3 THE COURT: Well, I mean, I guess I like the idea
4 that a trustee is subjecting his preference claims to an
5 ordinary course review before issuing them because generally,
6 like you say -- or I don't know what generally happens. I
7 haven't practiced law in a long time, but I know that a lot of
8 demands just go out based upon the amount of payments.

9 MS. PONADER: Right, it's (indiscernible)

10 THE COURT: Right. And then the negotiations begin,
11 as you've indicated. But -- and so, you want an order from
12 this Court that if the settlement -- if you reach an agreement
13 --

14 MS. PONADER: At the estimated net exposure.

15 THE COURT: -- at the estimated net exposure, you can
16 settle the case?

17 MS. PONADER: Correct.

18 THE COURT: And why do you need that before, instead
19 of after?

20 MS. PONADER: Well, Your Honor, we wanted to bring
21 additional efficiency to the system and to the proposals that
22 the trustee was undertaking, and also, in order to be able to
23 advise these transferees that --

24 THE COURT: See there's the problem that I have. I
25 mean, I'm all, as I've said several times in this case, I'm all

1 in favor of efficiency, but I don't want a demand from a
2 trustee to go out with some sort of a feeling or -- that it's
3 been, you know, the Court's already said you ought to pay this
4 amount because that's not what I would be saying, you know.

5 MS. PONADER: I understand.

6 THE COURT: They still -- they may -- I mean as you
7 know, you know, after BAPCPA, ordinary course can be industry
8 ordinary course or this -- of the relationship between the
9 parties, either/or. So, I don't know what I'll do and if an
10 individual comes in here in defense a preference case, and I
11 don't want any indication that I have -- I have stamped,
12 pre-stamped approval of saying you've got to pay this.

13 MS. PONADER: I appreciate that, Your Honor. That's
14 why we attached --

15 THE COURT: That's what --

16 MS. PONADER: -- that's why we attached the demand
17 letter.

18 THE COURT: Correct.

19 MS. PONADER: So that the Court would -- it would be
20 clear that the trustee is taking great pains to not say to
21 these folks you need to do this because this is what the Court
22 said you're going to have to pay. We have not said that.

23 We have in fairness in this demand letter, Your
24 Honor, advised these transferees that if settlement doesn't
25 occur as proposed, that the trustee will be obliged to bring

1 action and that the transferees will pass burden as they do as
2 a matter of law. This is not a threat. This is not a coercive
3 tactic.

4 THE COURT: No, I understand.

5 MS. PONADER: It is the burden as a matter of law
6 that they will have to prove those assumptions.

7 THE COURT: I don't mind you saying any of that. I
8 mean, that's just --

9 MR. KNAUER: Judge, I'd like to --

10 THE COURT: Yes.

11 MR. KNAUER: -- make one other point. This isn't so
12 much about trying to get Court approval that would somehow
13 pre-decide the issue with regard to the people we make claims
14 against.

15 What this is in part about is, there's four or five
16 hundred people that we don't think we should sue. But, if
17 creditors in this room are going to insist we sue every
18 potential preference holder, let's get that out in the open
19 now.

20 What we really don't want is people coming back later
21 and saying you should have sued all these people. We want to
22 tell the judge and the creditors present how we arrived at
23 these protocols and why we don't think we should make demand or
24 sue, at least based on what we know now, more than half of the
25 people who have received payments in the 90 days. That's a

1 significant part of what we are doing here.

2 THE COURT: I'm going to let him respond for a moment
3 before we go on.

4 MS. PONADER: Sure.

5 MR. BOWLES: Your Honor, on the last point Mr. Knauer
6 raised, that would be wonderful news. Your Honor, while we
7 filed this under Superior, we actually represent a lot of the
8 smaller people. When this came in, I believe we have 23 people
9 who were in the voluntary petition, mostly small cattle
10 producers and I believe in one case temporarily a trucking
11 company.

12 But, Your Honor, the main reason we filed this
13 objection is what you just said. First of all, let's go over
14 what the trustee's motion does not do. Mr. Knauer has said,
15 we'd like you to know that we're not going to sue these people.
16 That's wonderful. We will be overjoyed if that's what this
17 motion said.

18 This motion does not say I won't sue anybody who's
19 going to do that. It's been pointed out in here this motion
20 leaves that open. So while Mr. Knauer says, oh, that's our
21 intent, this order doesn't say I want to get rid of those. My
22 client would be overjoyed to get rid of the smaller people out
23 here, but they don't ask for that.

24 Secondly, Your Honor, they said the statement of, oh,
25 you'd be suing the checkbook. Not anymore, Your Honor. The

1 Supreme Court has had two new cases, Iqbal and Twombly. You
2 can't just go out and say, geez, are there ever any reasonable,
3 possible, conceivable (indiscernible) there that could win.
4 You have to do the analysis they did.

5 And if they filed a demand letter or filed a lawsuit
6 for the ones that they knew were here in course of business,
7 that, Your Honor, would violate both Iqbal and Twombly and
8 perhaps other parts of the Bankruptcy Code we don't need to get
9 into.

10 THE COURT: Have you seen any cases on that?

11 MR. BOWLES: Their duty is only to file on their net
12 recovery they would analyze.

13 THE COURT: Do you see any cases on that?

14 MR. BOWLES: Yes, Your Honor, constructing one in
15 Delpine (phonetic), plus several other ones. In other words
16 you have to be able to show it's plausible, Your Honor, out of
17 that or otherwise the case will automatically be dismissed and
18 in fact there are sanctioning Rule 11 (indiscernible). I
19 didn't send your court the conflicts, but that's what we've
20 had, including ones that pursued on --

21 THE COURT: All right. What do you really have
22 against this?

23 MR. BOWLES: Well, mainly --

24 THE COURT: Why -- how are you -- how are your
25 clients harmed by this?

1 MR. BOWLES: To be honest, Your Honor, the clients
2 who call me aren't harmed because we'll just take the trustee's
3 letter and address it appropriately.

4 The thing we really have, Your Honor, is the two
5 points we've already made. First of all, no matter what they
6 say -- Your Honor, when you were a trustee how many of the
7 people that came in front of you thought you were the Court? I
8 mean, and I don't need an answer, but the answer is a lot.

9 Most of the people that you're talking about here are
10 in fact farmers and cattle sellers. They're going to get this
11 letter. They're going to say --

12 THE COURT: All right. If they hadn't come in here,
13 Mr. Bowles, they're still going to get letters. I mean --

14 MR. BOWLES: That would be fine.

15 THE COURT: -- preference letters are going to go out
16 whether I approve this or not.

17 MR. BOWLES: That would be fine, Your Honor. What we
18 have is what you've said. This is the imprimatur of the Court
19 to prove this.

20 THE COURT: Well, I was just looking at the letter.
21 Why do you say -- I mean where -- I mean, that is a concern I
22 had just expressed. You're absolutely right. And I don't want
23 that. But, I don't know that I see that in the letter.

24 MR. BOWLES: Ah, but, Your Honor, the main thing is
25 it's going to be the order that comes along with the letter.

1 Now we can't police every discussion they ever had with these
2 people.

3 UNIDENTIFIED SPEAKER: We can't hear what you're
4 saying. I'm sorry.

5 MR. BOWLES: Okay.

6 THE COURT: The order approving this motion will give
7 the Court -- it would appear to give the Court's blessing to
8 the settlement.

9 MR. BOWLES: To the amounts, yes.

10 THE COURT: To the amounts.

11 MR. BOWLES: And that, Your Honor -- no, because I'm
12 not even going to worry about whether they can say they can't
13 do it. But, the fact that that's not going to come up in
14 conversation at some point or somebody looks on the trustee's
15 blog where all the documents are printed, somebody will find
16 that. Our main thing is, Your Honor, you know, there are lots
17 of --

18 THE COURT: Well you --

19 MR. BOWLES: -- there are lots of settled protocols.
20 We wouldn't have a problem with one that seemed to make sense.

21 THE COURT: What would make sense to you?

22 MR. BOWLES: If you wanted to use -- I mean there's
23 several, the Delpine model was you look at preferences over a
24 certain amount and you go below that. If you go --

25 THE COURT: Well that wouldn't make sense here.

1 Give me one that -- tell me what you would be happy
2 with in this case.

3 MR. BOWLES: Basically, Your Honor, they can send out
4 the letters that they can do in their good faith commands.
5 They don't need your blessing. That was the main thing that
6 just got us to supply what you wanted, the Court's blessing.

7 Now if they want to -- I'll tell you the other one
8 that would make sense. Go ahead and move to say we aren't
9 going to sue any of the people we think we have a net zero
10 against. I don't think any of my clients have a problem with
11 that. I don't think the vast majority of the people have a
12 problem with that.

13 MS. HALL: Your Honor.

14 MS. PONADER: Your Honor.

15 THE COURT: All right. Go ahead.

16 MS. PONADER: Your Honor, the suggestion that the
17 trustee is -- would at this point of this case waive any right
18 to this estate is preposterous. It does not know everything.
19 The trustee has -- we have done a serious analysis, Your Honor.
20 We have made -- the trustee has made its best efforts with the
21 help of its professionals to do this investigation.

22 But, it is entirely possible, Your Honor, that
23 somewhere down the road even though the Court may not want to
24 indulge me with another one of my charts, but I can show you
25 the transferee who is Toner Trails Farms (phonetic), Your

1 Honor, who received \$450,000 of (indiscernible) transfers who
2 comes in at a net zero because everything would appear based on
3 the trustee's favorable assumptions to be ordinary course.

4 If down the road we find out that Harcow Company
5 (phonetic) paid Toner Trails Farms a receivable that we're not
6 trying to collect and there's a \$40,000 transfer that we didn't
7 know about because it was not reflected by the company's books
8 and records --

9 THE COURT: Well I'm not going to ask you to give
10 passes to everybody that you're not presently intending to sue
11 right now. I mean you don't know -- I don't know any trustee
12 that's ever done that and the statute of limitations usually
13 takes care of that.

14 MS. PONADER: It does, Your Honor. We have until
15 December 6th of this year.

16 THE COURT: So but the only question here is I mean I
17 can't -- I'm having a hard time thinking of the last time, if
18 ever, I didn't approve a settlement on a preference. Maybe
19 that's happened, but -- do any of you remember that happening?

20 MS. PONADER: Well --

21 MS. HALL: Your Honor --

22 MS. PONADER: Go ahead.

23 MS. HALL: I mean, the main difference that I think,
24 I mean and the objection says in it, that the difference
25 between what the trustee is asking for and what sometimes is

1 normally asked for is authority to settle without further order
2 of the Court in an amount less than X. Instead of an amount
3 less than X we have put together a standard.

4 THE COURT: Correct.

5 MS. HALL: That's really in those kinds of motions
6 are fairly standard. Well I think there is somehow a belief
7 that we manipulated the standard or we use it to intimidate
8 people but.

9 MS. PONADER: That's right, Your Honor, and there is
10 accusations in the Superior filing that the trustee did this to
11 beat transferees into submission. That the process is intended
12 to intimidate the unsophisticated creditors.

13 To the contrary, Your Honor, and with respect to the
14 settlement authority we wanted to be more -- we couldn't really
15 establish that standard as Ms. Hall talks about because in fact
16 -- and there are cases, Your Honor, where transferees will have
17 received \$450,000 and then get \$30,000 of exposure. We would
18 need to take that number down to five percent.

19 So a more candid and transparent approach rather than
20 seeking authority under the auspices that Ms. Hall described as
21 ordinary which in fact they are, we wanted to actually lay out
22 for the Court this is what we've done and this is what we
23 propose to do.

24 THE COURT: All right. I understand the issue.
25 Anything last on the issue? I'm ready to move on. Last word,

1 Mr. Bowles?

2 MR. BOWLES: Nothing. Nothing more, Your Honor.

3 THE COURT: All right. I'll issue an order. Motion
4 to compel. This is Superior's motion to compel the trustee to
5 file a mandatory report. The trustee is basically saying they
6 want to wait at least until the investigation that's -- report
7 in March is made. Isn't that basically what you said?

8 MS. HALL: Yes, Your Honor. Well part of it was the
9 budgets and the financial statements. We did that with Ms.
10 DelCotto's.

11 THE COURT: And you don't want to amend your
12 statement of affairs until the investigation is complete and
13 you've determined what you're going to do?

14 MS. HALL: Well I mean the statement of financial
15 affairs and the snapshot on the petition date, if it's -- if
16 they're looking for us to amend that so that they can find out
17 what's happened since.

18 MR. ROGERS: No.

19 MS. HALL: That's not really the case.

20 THE COURT: That's not what they asked I don't
21 believe.

22 MS. HALL: And we don't --

23 MR. ROGERS: No, that's --

24 MS. HALL: -- we don't believe we have to do it
25 numerous times.

1 MR. ROGERS: What we're really seeking here is
2 information as of the petition date which is crucial
3 information, we think, for creditors in the case trying to
4 evaluate it. In particular it would be relevant from our point
5 of view to assessing what is Fifth Third's collateral? Did
6 they improve their position?

7 Key questions in the case and the schedules
8 understandably when they were filed don't really communicate
9 the information about assets. As the trustee points out the
10 books and records were a mess, they're all kinds of fraud going
11 on.

12 So the -- everything in the schedules is highly
13 qualified to the point of the operating account, the balance is
14 indicated as unknown, accounts receivable. Inventory schedules
15 indicate \$35 million of inventory, but we think 20 million of
16 this is undocumented.

17 THE COURT: All right. When do you think you'll be
18 in a position to do that? After the report --

19 MR. KNAUER: Could I make a couple of comments,
20 Judge?

21 THE COURT: Yes.

22 MR. KNAUER: The schedules will not -- amending the
23 schedules will not provide the kind of information that Mr.
24 Rogers is talking about. This is a moving party and if I amend
25 the schedules and I put down \$15 million is the claim against

1 Superior Livestock, I'll probably get a letter from Mr. Ames,
2 and I have in the past, saying I shouldn't be making claims
3 like that especially in the public domain.

4 If I put down that we have \$25 million worth of
5 preference claims then they're going to want to have the
6 creditor call to go over each one of them.

7 All of the assets that have been liquidated are in
8 the reports. All of the money that's been collected are in the
9 reports. All of the money that we started with, for example
10 beginning bank accounts, are in the reports.

11 These creditors are about as well informed in a
12 liquidation case as any group of creditors could be as to what
13 I think most of the asset values are and the remaining kinds of
14 things we're going to put down are the amounts of the claims
15 that are in litigation.

16 We're not going to put down on the schedules that we
17 think this interpleader case is worth less than the face value
18 of it. We're not going to put down in the schedules that this
19 claims against Superior or Joplin or anybody else is worth less
20 than the face value of it.

21 THE COURT: Correct.

22 MR. KNAUER: So I don't think that amending the
23 schedules in that way is going to be particularly enlightening
24 to a creditor.

25 MR. ROGERS: Well --

1 MR. KNAUER: And it changes from week to week or
2 month to month for sure.

3 THE COURT: But didn't I see in your reply that you
4 were also awaiting the report of special counsel as to --
5 that's due in March --

6 MS. HALL: Well there were three requests in the
7 motion.

8 THE COURT: Correct.

9 MS. HALL: One was the budgets financial, one was the
10 1106(a) report, and one was the amendment of the motion -- of
11 the schedules. I think the 1106(a) report had to do with the
12 Fifth Third.

13 MR. ROGERS: And from our point of view that's sort
14 of a mis-reading of the request. And what we're talking about
15 here of course are the duties of the trustee, you know, the
16 schedules, they need to provide the best information they have
17 whether -- whether they think it's useful or not it's a duty.

18 THE COURT: Well I mean I don't want them amending
19 their schedules every week as discovery is ongoing in this
20 litigation and the numbers change or now they have a claim for
21 an asset that might -- they now want to list for more than they
22 thought it was worth at the time of trial. I mean how do we
23 get around that, Mr. Rogers?

24 MR. ROGERS: And I understand that and I think it's
25 taken as a given that whatever is put out there isn't

1 absolutely precise. But this is a case where we've had \$4
2 million of professional fees, lots and lots of analysis of all
3 the things we're talking about.

4 And what I'm saying is shouldn't we have the benefit
5 of this is our best view now of what the inventory was worth on
6 that day. This is our best --

7 THE COURT: All right. Let's take these one at a
8 time. That's your first request that there be a revised filing
9 as to the value of the inventory on the date of the petition,
10 is that correct?

11 MR. ROGERS: Correct, Your Honor.

12 THE COURT: All right. What about that? Do we have
13 better information now than we --

14 MR. KNAUER: We've sold all the inventory. We know
15 what those figures are in the reports and we can summarize
16 them.

17 THE COURT: All right. Summarize those. The motion
18 is granted to that respect that you summarize the results of
19 the sales of inventory that were available as of the petition
20 date. What's the second one?

21 MR. ROGERS: It's not in the schedule but it's
22 related. One of the questions that's not answered in the
23 statement of financial affairs relates to set offs and bank
24 accounts.

25 We spoke with the trustee, I don't know, ten days

1 ago, who indicated that analysis was done, completed in March
2 of last year. The DSI was prepared to testify about that issue
3 and that they would forward the analysis to us. We haven't
4 received it and I gather from their response that they're not
5 going to forward it.

6 THE COURT: What about that?

7 MS. HALL: That's not true. It's not that we're not
8 going to forward it. March 10th was a long time ago. It
9 wasn't testified to. We asked DSI to provide the report to us
10 again so we could look at it and talk to them about it so that
11 we understood it and we'll provide another report.

12 THE COURT: All right. I'll grant that so that's to
13 be provided within 30 days. What's the third thing you want?

14 MR. ROGERS: Accounts receivable and the schedule is
15 kind of the same issue as inventory. They're highly qualified
16 statements to the effect of, you know, we're not sure if this
17 is --

18 THE COURT: Do we have better information about --

19 MS. HALL: Accounts receivable are listed on every
20 single monthly operating report.

21 MR. ROGERS: But those are the current accounts
22 receivable, not as of the petition date.

23 MS. HALL: If you go back and look at every one of
24 them you will find it.

25 MR. ROGERS: But they're mixed in with cattle sales.

1 THE COURT: I'm going to deny that portion of the
2 request. What else?

3 MR. ROGERS: I think as far as the schedules and the
4 statement of financial affairs, that covers it. The report,
5 the concern there is the trustee in their response is kind of
6 focused on the investigation of Fifth Third and that cause of
7 action.

8 That isn't really what this motion was intended to
9 address. We understand Hoover Hull is doing that.

10 THE COURT: What was the motion intended to address
11 then?

12 MR. ROGERS: Well the trustee of course was brought
13 into the case at the request of Superior and others to
14 investigate fraud, to sort through the financial affairs of the
15 debtor and make sense out of them, find out causes of action.

16 I understand Hoover Hull is going to report on Fifth
17 Third, but obviously there are causes of action. The trustee's
18 been pursuing them. The trustee wants a protocol. The report
19 that the statute requires says tell us what the causes of
20 action are. We don't have any information about that.

21 It's my understanding they've been sharing with Fifth
22 Third not only the causes of action but the estimated
23 recoveries on the causes of action. So the trustee is telling
24 us we can't give you even a description of the causes.

25 THE COURT: So you're asking that they file pursuant

1 to that report a list of the causes of action that they're
2 pursuing?

3 MR. ROGERS: As well as the other thing the statute
4 specifically talks about is fraud. And we've all talked about
5 fraud in this case. We say there's fraud, Fifth Third says
6 only it was defrauded, check kiting. A fundamental reason the
7 trustee was brought in was to sort out what was the fraud.

8 The Court's recent opinion talks about what role did
9 the debtor play? Did they know these checks were going to be
10 bad? Did they not know?

11 To the extent the trustee's investigated the fraud it
12 could say here is the evidence of check kiting, here is the
13 evidence of what they did with the sellers, whatever the fraud
14 is, that's their role here to report it.

15 THE COURT: Mr. LaTour?

16 MR. ROGERS: So that we're not trying to figure it
17 out. And that's what \$4 million has been spent on.

18 THE COURT: Well not exclusively.

19 MR. ROGERS: Certainly.

20 MR. LaTOUR: Your Honor, I'd like to weigh in on a
21 couple of points. First of all whatever values are placed in
22 the schedules by the trustee in this retrospective are not
23 determinative of the outcome and don't have evidentiary weight.
24 So the urgency of the task and the, you know, the purported
25 value of the information is rather suspect in my opinion.

1 A report of all the causes of action and everything
2 else that the trustee knows in a liquidating case, this is a
3 liquidating 11, ten months before the end of the time period in
4 which a trustee is going to do that is also highly suspect as
5 to its probative value. One, some things haven't been
6 determined and, two, some things could change.

7 What really is driving people is the urge to know
8 what the answer is going to be. We all want to know what the
9 answer is going to be and I suspect if we knew to the penny how
10 many dollars there were on the table that this collection of
11 attorneys which must have some 200 years of experience among us
12 could probably sit down and make a deal and divide up the
13 money. The problem is we don't know how much money is there
14 yet because the litigation hasn't concluded yet.

15 THE COURT: All right. Do you want to respond to the
16 last thing that Mr. Rogers said, Mr. Knauer?

17 MR. KNAUER: Judge, when we --

18 (Brief break in audio - 11:30:48-11:31:05)
19 filed these budgets on the website, we didn't just file the
20 budgets. We had a call with everyone that wanted to
21 participate so they could ask questions about them and a
22 statement was made during that call that someone said is that
23 everything that's been given to the bank and we said these
24 budgets, except we changed the format slightly in this quarter,
25 but these budgets are identical except for this one change in

1 format to what has been given the bank.

2 And then they said was the bank given anything else
3 and we made the statement that we had reported to the bank our
4 assessment of some of the pending litigation, where we thought
5 it might go in terms of a recovery.

6 The creditors then asked if they could have that and
7 I told them no. The reason I told them no is the same reason
8 if Mr. LaTour asked me how we were doing on our investigation
9 of the bank and where we thought it might be headed. I'd tell
10 him no.

11 And I told the other creditors with regard to
12 litigation in which they're participating, we were not going to
13 give our opponents our evaluation of that litigation or where
14 it might come out any more than we would give Mr. LaTour our --
15 a report on how we were doing investigating the bank.

16 THE COURT: All right.

17 MR. KNAUER: So --

18 THE COURT: All right.

19 MR. KNAUER: -- other than that we gave the creditors
20 everything that we had given to the bank. I think they were a
21 little disappointed that it wasn't -- I think they thought the
22 bank was getting a lot more detail and a lot more involvement
23 and I think they were surprised that it wasn't.

24 MR. ROGERS: Your Honor?

25 THE COURT: All right. Last word.

1 MR. ROGERS: Okay. It will be very brief, Your
2 Honor. I think that sort of summarizes the problem here with
3 the comment that the perception that everyone in the case is
4 the trustee's opponent with the exception of Fifth Third.

5 These are reports the trustee is required to file
6 and, yes, we know the information in the schedules is not
7 absolute, not everybody can rely on it. But we do want the
8 benefit of the analysis that's been done.

9 THE COURT: All right. The trustee is required to
10 file that report. I'll order the trustee to file that report
11 within 30 days. You don't have to put your litigation strategy
12 and I mean you can figure out how to file and comply with the
13 provision that requires that the report be filed.

14 I don't think this is going to be any great benefit
15 to you, but I think you're right that it is a requirement. So
16 I'll grant the motion to that extent. Anything else on that?

17 Let's move on. Motion to extend deadlines. I don't
18 think there was any objection to that. I'll show that that's
19 granted.

20 MR. DONNELLO: Thank you, Your Honor.

21 THE COURT: Motion for a protective order of Fifth
22 Third. I understand Fifth Third's concern. I'm just a little
23 bit concerned that -- and I understand the creditor's concerns
24 also.

25 I'm just a little bit of the initial impression that

1 this might be a little premature and that we don't know what
2 the bank -- I mean obviously I'm not going to let every single
3 person, you know, take depositions of the bank and we're not
4 going to do -- keep repeating depositions of bank officers.

5 But I'm not willing to give you something today that
6 says so and so will only have to give one deposition and it
7 could be so many hours. Yes?

8 MR. LaTOUR: Your Honor?

9 THE COURT: Why don't you stay seated. I don't want
10 any incidents here.

11 MR. LaTOUR: Don't want me falling over. Okay.

12 THE COURT: No.

13 MR. LaTOUR: I'd like to address that if I could.
14 Hoover Hull has a time line that it's trying to meet.

15 THE COURT: Right.

16 MR. LaTOUR: And the adversary proceedings have their
17 own time line. And you are correct that Fifth Third, who has
18 been noticed that some 11 of its employees or former employees
19 are to be deposed and in addition another party, so that would
20 be 11, potentially 11 times 7 different adversaries which would
21 be 77 hours of deposition.

22 And all I was trying to do was to put the issue in
23 front of us and let us figure it out rather than be here with
24 serial objections or serial motions to compel or serial motions
25 for a protective order.

1 Now I thought that on Friday that we had worked out a
2 way to make this work and that did not turn out to be the case.

3 (Brief break in audio - 11:36:05-11:36:36)

4 MR. LaTOUR: Since that time the special counsel has
5 filed a motion for a 2004 exam.

6 Now what's not a problem is, is we had a conference
7 before this hearing. We believe that the paper discovery will
8 be completed this week, hopefully by Wednesday, maybe as early
9 as tomorrow.

10 The witnesses are available one way or the other
11 either in the week of the 20th or in the week of the 27th. So
12 that part of the time line can be squared away.

13 The question then becomes does Hoover Hull's counsel
14 because its notice is a 2004 exam, is Hoover Hull the only
15 questioner in the examinations or not and then if that answer
16 is yes then the next question becomes when we have seven
17 overlapping fact patterns in these adversary proceedings does
18 that turn into seven sets of depositions? My suggestion --

19 THE COURT: The answer to that is no.

20 MR. LaTOUR: Yes, Your Honor. My suggestion there
21 is, is that if the order says that Hoover Hull will conduct
22 exclusive the 2004 questioning and that you're not going to
23 rule now on the basis of how to handle these other adversaries,
24 it seems to me that the parties can get together and figure out
25 how to do a deposition protocol that sort of mirrors what we

1 did with the evidence protocol.

2 THE COURT: Well I think that's exactly what I was
3 thinking. That there should be a Hoover Hull 2004 limited to
4 Hoover Hull because they're under a special mandate to conduct
5 this investigation and they're under a deadline.

6 And the other parties who are still conducting
7 discovery and reviewing documents need to work out then a
8 protocol for deposing the bank at a later time if they feel
9 it's necessary. I mean Hoover Hull may still cover most if not
10 all they wanted to ask anyway. And they certainly will have a
11 right to review that.

12 And they're going to have to come up with something
13 like lead counsel and the other attorneys probably can be
14 present and but if you all can't come with a protocol I'll help
15 you develop one because we're not going to do seven different
16 depositions of the bank officers. Yes?

17 MR. DONNELLON: Your Honor, this is Dan Donnellon for
18 First Bank just to be heard on this issue is as I put down in
19 our objection on this issue, depositions were being scheduled.
20 The only question on the table at all was will these be noticed
21 up as a 2004 limited to bankruptcy or notice across everything
22 and Mr. White agreed to do that.

23 Then it became well let's limit it one shot, we'll
24 just have Hoover Hull, then you can get a transcript and come
25 back. And the problem at all with that is given your most

1 recent order on the issue on Packers and Stockyards, the
2 additional creditors are now also under a gun. It's not a
3 short a time line as Hoover Hull, but theirs is still only
4 assigned as, to my knowledge, as a preliminary report of where
5 are we going.

6 THE COURT: That's a good point.

7 MR. DONNELLON: The other creditors have been trying
8 to assist Hoover Hull in the deposition and I can certainly
9 understand working out a lead counsel or a quorum of some sort
10 that would try to cover as much as we can. There may
11 ultimately be a need for a second deposition in another set of
12 circumstances.

13 Mr. Newbern from Florida has issues under Florida law
14 that the rest of us don't have. But to put any limitation on
15 it now --

16 THE COURT: What limitation do you think we're
17 putting on it now? I mean --

18 MR. DONNELLON: Mr. LaTour as I understand it said
19 we'll notice of a deposition, Hoover Hull will appear, ask its
20 2004 questions. Then if anybody else wants to do it at a later
21 date we can come back in after we've got that transcript. And
22 that's not workable. That's a premature limitation on that.

23 THE COURT: Well what would your suggestion be? I
24 mean if it is a 2004 don't -- I mean I agree that Hoover Hull
25 should be asking their questions at a 2004.

1 MR. DONNELLON: No doubt. No doubt. And we've tried
2 to do that. That's why when we had this, this telephonic
3 conference I was getting questions of well, Dan, you've never
4 even noticed of a deposition because I'm not -- I'm trying to
5 not get in the way of what Hoover Hull is trying to do here.
6 I'm trying to help Hoover Hull in its investigation, not impede
7 it at all.

8 And on the other hand when we get dates scheduled and
9 we can't get everything then the dates --

10 THE COURT: All right.

11 MR. DONNELLON: -- go away and they're abandoned.

12 THE COURT: I don't have. All right. Why don't you
13 all -- I mean do you think you all have discussed this as much
14 as is going to be possible or do you want me to figure it out
15 for you today or --

16 (Brief break in audio - 11:41:36-11:41:47)

17 THE COURT: -- there discussions ongoing. But let me
18 make a couple points before I say this. You made a good point
19 that I hadn't really thought about and that is that, you know,
20 I have put some time -- a time line on you in terms of the
21 Packers Stockyard issue.

22 I don't think the bank representative, it's probably
23 not in his or her best interest to have to come back again in
24 two weeks or three weeks and give a deposition on the stockyard
25 issue. So I think it might be useful for you to ask that some

1 of that be included in the 2004 exam.

2 MR. DONNELLON: May I make a suggestion for the
3 protocol?

4 THE COURT: Yes.

5 MR. DONNELLON: I wanted to. I was the one who
6 arranged the conference call and I wanted to flesh this out and
7 we got nothing but resistance from the bank.

8 And I think the idea of saying we're going to have
9 Hoover Hull do the investigation and we will -- the other
10 creditors can get together and say we'll have two or three
11 other lawyers who can ask questions as long as it doesn't
12 foreclose the possibility of doing another deposition.

13 Nobody wants to harass the deposition by doing seven
14 depositions and no one is going to. My client doesn't want to
15 pay me to depose somebody who's been deposed six times. But
16 there may be discreet issues down the road.

17 So if we can have a protocol that says Hoover Hull
18 will take the lead, will ask all the questions to Mr. White's
19 satisfaction, and then if there's one, two, three other lawyers
20 who we agree will be prepared to ask additional questions that
21 may not be on his agenda, and we'll try to complete the
22 depositions in an orderly fashion, that way in accordance with
23 schedules that Fifth Third sets and holds to, I think that's
24 the most reasonable way to accomplish this.

25 THE COURT: Well here's the problem with that. I've

1 been at depositions before where the secondary I mean the first
2 lawyer goes through and covers most of it. Then the secondary
3 lawyer comes on and takes three times as long as the first
4 lawyer did.

5 MR. DONNELLO: I wouldn't expect it to be the case
6 because I know Mr. White's firm and I know they're quite
7 skilled. But there are situations where if the first lawyers
8 comes in and doesn't complete the discovery to my satisfaction,
9 I'm going to continue to ask questions until I've satisfied
10 myself. But I'm not going to be duplicating questions that
11 were already asked that's --

12 THE COURT: Mr. White? Is -- who's here for Hoover
13 Hull?

14 MR. WHITE: I am, Your Honor.

15 THE COURT: Yes.

16 MR. WHITE: From our perspective, Your Honor, we want
17 to advance our investigation. That's why we filed the motion
18 for Rule 2004. There was an issue that was raised about
19 whether or not to notice the depositions in the bankruptcy and
20 the adversary proceedings and after some lack of good
21 communication we made clear to the bank that we're willing to
22 do them both in the bankruptcy and adversary proceeding.

23 What we couldn't agree to and obviously we don't have
24 the authority to bind any of the other parties in the room, is
25 to one deposition of seven hours. What I understood from the

1 bank is that these witnesses are available next week, the 20th
2 and 27th.

3 As the Court and some of the parties have recognized,
4 we're operating under a deadline to report back to the Court a
5 preliminary report by March the 13th and we're trying to meet
6 that Court's deadline. That's why we asked for the depositions
7 back in January and actually to begin tomorrow.

8 With the time line we're getting with these
9 depositions it's going to be very difficult to meet that
10 deadline, Your Honor, and if we're going to now include
11 information relating to the Packers and Stockyards Act, that's
12 going to further delay our schedule.

13 THE COURT: How could we incorporate the Packers and
14 Stockyard issue into your examination? What would be your
15 suggestion there?

16 MR. TONER: It's not obvious to me, Your Honor.

17 MR. LaTOUR: Your Honor, if I could jump in. The
18 deal that fell apart on Friday contemplated two rounds of
19 depositions. I had reconciled myself to the necessity of it so
20 that Hoover Hull can complete its investigation timely.

21 THE COURT: All right.

22 MR. LaTOUR: And I recognize that the Packers and
23 Stockyards issue was going to come up at a later time. In
24 terms of the witness information that it does not make sense to
25 try to push those two together.

1 THE COURT: All right. I don't -- I agree with that.
2 And here's what I'll do. If you need me to I'll extend the
3 Packers and Stockyards deadline. But I think it needs to be
4 done separately. I think trying to jam it all together or
5 trying to have him ask your questions is not going to work,
6 it's not going to be fair to you.

7 I still want you to work on a protocol for the second
8 round of depositions. But on a simple motion you let me know
9 when you're able to get that scheduled and I'll extend the
10 Packers and Stockyards deadline.

11 UNIDENTIFIED SPEAKER: Then just for clarification
12 will Mr. White be the only attorney permitted to ask a question
13 or even to attend?

14 THE COURT: You can attend and listen if you'd like.

15 UNIDENTIFIED SPEAKER: Okay.

16 THE COURT: But he'll be the only one permitted to
17 ask questions at the 2004.

18 UNIDENTIFIED SPEAKER: In round one, in the 2004
19 round.

20 THE COURT: In the 2004, yes.

21 UNIDENTIFIED SPEAKER: I will be happy to work on a
22 protocol.

23 THE COURT: All right.

24 UNIDENTIFIED SPEAKER: Your Honor?

25 THE COURT: Go ahead.

1 UNIDENTIFIED SPEAKER: Mr. Donnellon's client is
2 First Bank & Trust and its claim is that some of its collateral
3 has been commingled into the estate of Eastern. Why First Bank
4 & Trust takes the lead on working on a protocol on causes of
5 action that it has nothing to do with is --

6 THE COURT: I don't care if he takes the lead. He
7 wants to suggest a protocol. You can reject it and suggest
8 your own protocol. Protocol discussions can be ongoing. I'm
9 not restricting anyone.

10 I mean he's an experienced attorney. He may have a
11 good idea. I'm, you know, listen to is. That's all I'm
12 saying. Okay.

13 MR. LEBAS: Your Honor, David LeBas with a request to
14 inject a question of these procedures. I can understand the
15 limitation with respect to the 2004 examination as it
16 originally started.

17 But over time the parties to that discussion remain
18 very limited which is the Hoover Hull folks, the bank folks,
19 and evidently Mr. Donnellon and I'm not sure who else.

20 But we did not learn of the prospect for who it was
21 and when it would be until very late in the game. And so I ask
22 that as the deposition schedule goes forward that the -- that
23 all the parties be told about it so they can be given an
24 opportunity to make a decision about whether they think it's
25 important to protect their client's interest or not.

1 I also ask that the parties consider setting up some
2 sort of remote attendance facility for the depositions. Again,
3 parties may or may not -

4 THE COURT: Now are you talking about the depositions
5 or the 2004 exam?

6 MR. LEBAS: Both.

7 THE COURT: All right. I think that's a good idea.
8 Try to arrange it in a room that has a conference phone
9 available so that people can monitor it without physically
10 attending.

11 MR. DONNELLON: So that we're clear on this, Your
12 Honor. I wasn't trying to exclude anybody. I've been letting
13 Mr. White schedule and assumed he would ultimately have a
14 notice or a subpoena that everyone -- that would be filed --

15 THE COURT: Right.

16 MR. DONNELLON: -- and everyone would know that.

17 THE COURT: I understand. And if you all --

18 MR. LEBAS: I'm not suggesting that. I would ask if
19 possible that whoever is setting this up consider whether video
20 capacity would be available. Sometimes that's a lot easier to
21 handle than to just simply by listening on the telephone.

22 THE COURT: All right. You ought to consider that.
23 I know a lot of it's done that way these days. All right. Now
24 as to the protocol. I think you've pretty well worked out how
25 the first -- are there still issues as to the 2004 exam or is

1 that pretty well resolved?

2 UNIDENTIFIED SPEAKER: No, sir.

3 THE COURT: That's resolved. All right. The second
4 one you're all going to make suggestions and suggest protocols
5 and if you run into a disagreement I'll be happy to resolve it
6 by phone. You don't have to wait for another omnibus date.
7 I'll clear up any issues you have in that regard. All right.
8 Let's move on.

9 MS. HALL: I think we're just down to the adversary
10 proceedings.

11 THE COURT: We're down to the adversary proceedings.
12 Let me bring up -- let me go back and resolve some of the
13 issues that I didn't rule on today and talk about some of the
14 other issues.

15 All right. As to the motion to hire Rubin & Levin on
16 the preferences. I'm going to grant that motion on this
17 condition. First of all that there be a new letter of
18 engagement or maybe that the new letter of engagement specify
19 what was represented here today that's going to be dealt with
20 and that is the preferences.

21 Second of all that it be clarified and the parties
22 strictly follow the fact that all Rubin & Levin will be doing
23 in Eastern is the stuff that related to Fifth Third Bank.

24 If they want to take a broader role in Eastern than
25 that, which they may decide they'd like to do, then I'm not

1 going to grant the application in the other case. But I will
2 grant it on the condition that that's their only role over
3 here. We've got waivers that cover it. And this is their only
4 role over here and we've got waivers to cover it. So that will
5 be granted.

6 As to the objection -- as to the motion for the
7 protocol on the preferences, I'm going to grant that over the
8 objections. And I'd like an order approving that.

9 As to the ruling that I made on Friday as to the
10 constructive trusts, I need the trustee or someone, I mean
11 we're doing this but I need to make sure that we have an order
12 in all appropriate instances and a suggestion as to where we
13 think we might need those orders.

14 I know that you had a pending motion that was -- that
15 started this mess. In the case in chief you had a motion. I
16 think there are adversaries, other adversaries that raise the
17 same issues.

18 MR. TONER: That's right. The Downs case for
19 example.

20 THE COURT: The Downs case for example. So --

21 MR. TONER: Kevin Toner for the trustee. As to the
22 pending adversaries, I think the parties in those adversaries
23 could figure out how to submit it into that record.

24 THE COURT: Well, that's what I'm saying. We need to
25 get it in the record in the appropriate adversaries.

1 MR. TONER: But, as far as notice to the world, like
2 we've heard today, that wasn't quite sufficient. We'll put it
3 on the trustee's blog, we'll put it in the repository so that
4 everyone has a copy of it so they can see what happened.

5 THE COURT: All right. Superior's -- other matters
6 that I have under advisement, and I want to make sure the
7 parties are aware of what I have -- we have Superior's motion
8 for declaratory judgment on the forward contract issue. I
9 still haven't issued an order on that.

10 The dispositive motions concerning the Nicholas and
11 the Texas Cactus v. Nichols (sic). That's being worked on.

12 And then well the stipulated question concerning
13 constructive trusts in the contested matter and the objection
14 to claim issue in the case in chief which will be covered by an
15 order concerning the constructive trust issue.

16 And we still of course have the Packers and Stockyard
17 issue that's not resolved in any case. And what else?

18 MR. TONER: As I was writing I'm not sure if I heard
19 you mention the five lots of cattle that's subject to a summary
20 judgment motion. I think that's now been fully brief. Am I
21 right, Mr. Ames?

22 MR. AMES: Yes.

23 THE COURT: Do we have that on -- is that on -- what
24 --

25 MR. TONER: That is in the Superior adversary I

1 believe. Yes.

2 THE COURT: Yes, okay.

3 MR. TONER: Motion for partial summary judgment.

4 THE COURT: Okay. I don't know that that -

5 MR. TONER: And there is one on delivered cattle also
6 in the Superior adversary.

7 THE COURT: Delivered cattle?

8 MR. TONER: Delivered cattle.

9 THE COURT: Yes. Okay. Both in the Superior
10 adversary.

11 MR. TONER: Correct.

12 THE COURT: All right. Let's go through the pending
13 motions very quickly in the adversaries and see if -- Superior
14 versus Eastern. That motion of Fifth Third for protective
15 order. Mr. Bowles.

16 MR. BOWLES: Your Honor, on Superior versus Eastern
17 the protective order was definitely just copied, filed, and the
18 same thing on the protective order for all depositions.

19 THE COURT: Oh, that's what I thought.

20 MR. BOWLES: Yes, Your Honor.

21 THE COURT: So that's been resolved.

22 UNIDENTIFIED SPEAKER: That's right, Your Honor,
23 we've already resolved it.

24 THE COURT: All right.

25 MR. BOWLES: And since you say you have it under

1 advisement, the other two motions go to Fifth Third's motion
2 for a summary judgment, those were stayed pending the Court's
3 ruling. So that's the only thing. Other than I think that Mr.
4 Toner said that there is our motion also for partial summary
5 judgment on what we call the non-debtor cattle which I believe
6 is one of the two you talked about so.

7 THE COURT: All right. Friona. We've got a motion
8 for leave to file answer out of time for defendants Nichols.

9 MR. DAWSON: Yes, Your Honor.

10 THE COURT: Response.

11 MR. LOVELL: John Lovell from Cactus Growers.

12 MR. DAWSON: And Jack Dawson for the Nichols', Your
13 Honor.

14 THE COURT: Go ahead. Mr. Dawson, you want to go
15 first?

16 MR. DAWSON: Yes, sir. It came to our attention as
17 we were briefing the motion for summary judgment that we have
18 not filed an answer. We have filed a motion to dismiss in the
19 injunction stage. We have filed motions -- a motion for
20 summary judgment in this case. We've responded to Cactus'
21 motion for summary judgment in this case. And we've conducted
22 discovery, we've appeared at depositions. I've appeared on
23 nearly every one of these omnibus hearings. And then it came
24 to my attention that I have failed to file an answer.

25 MR. LOVELL: Your Honor.

1 THE COURT: Response?

2 MR. DAWSON: And affidavit.

3 MR. LOVELL: The response, Your Honor, is that this
4 was a conscious litigation decision on behalf of the Nichols.
5 They have been trying to figure out a way to avoid jurisdiction
6 of this Court so they could avoid res judicata out of this
7 Court so they could continue the litigation in Oklahoma when
8 their role up here is finished.

9 So that they have -- matter of fact their attorney
10 was served at the same time they were. So they've been aware
11 of this litigation and the claims made against them. They've
12 made the decision consciously to not appear until we finally
13 filed a motion for default judgment.

14 Don't believe they've stated any grounds that would
15 allow them to file an answer late since they -- it was a
16 conscious decision.

17 MR. DAWSON: And then I forgot to add, Your Honor, we
18 also filed a joint statement at a pre-trial conference. I
19 forget exactly if it was a joint pre-trial conference statement
20 or after the Nichols were served. I did not know that the
21 Nichols had been served a summons. That information came to me
22 later.

23 THE COURT: Well how would not filing an answer have
24 helped them escape the binding? I mean if they submit -- if
25 they're briefing the summary judgment motion and there is a

1 summary judgment issued against them, I don't think any Court
2 is going to say well they didn't file an answer so that doesn't
3 count do you? No?

4 MR. LOVELL: No.

5 THE COURT: I'll grant the motion. I'll let them
6 file an answer and I'll rule --

7 MR. DAWSON: May I be excused, Your Honor?

8 THE COURT: Yes, you may.

9 MR. DAWSON: Thank you, sir.

10 THE COURT: Can I?

11 (Laughter)

12 THE COURT: Not yet. Innovative. That's the same
13 protective order I believe that we've dealt with. Rush Creek.
14 That's the --

15 MS. HALL: That's the motion to consolidate.

16 THE COURT: -- that's the consolidation motion that I
17 have continued. And the same for protective order of Fifth
18 Third and their response to the consolidation. So that will be
19 dealt with at the next omnibus. Breeding Brothers' motion to
20 Fifth Third. Same thing. Gibson case. I just ruled on that.

21 Now is there anything that didn't make the docket or
22 that any other party wants to bring before the Court this
23 morning? Mr. Levin?

24 MR. LEVIN: Thank you very much, Your Honor. I would
25 like just for a moment to revisit the one ruling that the Court

1 has made this morning.

2 Pam Donaldson and John Rogers from my office have a
3 great deal of knowledge and have done a great deal of research
4 in matters involving Fifth Third. I think that the limitation
5 that the Court has put on the 2004 examination should be
6 modified to allow just two other attorneys, Pam Donaldson and
7 John Rogers, to be present for that examination for the simple
8 reason that Sean does not have the background that these two
9 people have.

10 I asked the trustee if he has any objection to that
11 and he does not. The only objector seems to be Fifth Third who
12 is limiting the individual who is going to make the
13 examination, who has limited knowledge about what has
14 transpired here.

15 And I think including Mr. Rogers and Mr. -- I hope
16 you don't get mad at me, John -- including Mr. Rogers and
17 Deanna, it would be beneficial. Now we tried to do this
18 through the ad hoc committee and have one attorney be able to
19 do these things. And that letter went to this Court.

20 But to limit this 2004 examination which will be very
21 important, one of the central matters of this -- the action
22 against Fifth Third if there is an action, is one of the
23 central matters of this proceeding.

24 And to limit Sean to be the only one to question
25 right now I think is a mistake and I don't think it's fair to

1 the other creditors.

2 MR. LaTOUR: Your Honor, I'd like to speak to that if
3 I could please.

4 THE COURT: Okay.

5 MR. LaTOUR: What you've just heard is another
6 example of people who want to substitute their judgment for the
7 judgment of the trustee and his professionals.

8 They've already now indicted Sean White as being
9 unable to ferret out whatever there is to ferret out. One,
10 it's a preliminary report; two, they're going to get their
11 chance to depose the witnesses and cover any kind of ground
12 that wasn't asked before; three, First Bank is pursuing a
13 different agenda in this case than everybody else.

14 And what we're going to have if this suggestion is
15 taken is the tail wagging the dog here. You're going to have
16 the very situation you announced where Hoover Hull spends two
17 hours and somebody else spends five hours and they're not
18 spending five hours investigating the subject at hand but they
19 are instead pursuing their own agenda.

20 Now there is really utterly no need to assume the
21 problem that is being assumed here. They should let Hoover
22 Hull do the job and if there is a subsequent deposition on
23 point it can be raised.

24 I have no doubt whatsoever that any and all theories,
25 suppositions, and accusations that can be made in this case

1 against Fifth Third will be made because they're constantly
2 being made without regard to factual basis. So there is just
3 no need to lard an extra layer of questioners into this 2004
4 examination.

5 MR. LEVIN: Before I raised this to the Court I asked
6 Mr. Knauer if he had any objection and he has no objection
7 whatsoever. So I want to correct Mr. LaTour on that point.

8 I just think that it makes the proceedings a little
9 bit more open, more transparent, and it helps to remove the
10 suspicion that some creditors have.

11 THE COURT: What's the time limitation you've put on
12 the questioning?

13 MR. LaTOUR: Your Honor, the Federal Rules put a
14 seven hour limitation on. It's not my limitation, it's --

15 THE COURT: And is that --

16 MR. LaTOUR: I'm sorry?

17 THE COURT: Well I didn't finish the sentence. And
18 is that what you've agreed to, Mr. White?

19 MR. WHITE: Well, Your Honor, there's still some
20 outstanding documents so to the extent we don't get a full
21 production prior to the depositions we have the right to go
22 back and complete the deposition.

23 MR. LaTOUR: That's correct, Your Honor. It's still
24 limited to seven hours.

25 THE COURT: All right. Here's the way I'll amend it.

1 If you want -- if you want to give any attorney any of your
2 time you can do that. If you don't, you don't have to. That's
3 up to you. This is your exam to try to -- to file your report.
4 If you decide it would be useful to you to have somebody who
5 has investigated it, ask some of the questions, I'll let you do
6 that.

7 THE ATTORNEYS: Thank you, Your Honor.

8 MR. LEVIN: Thank you very much, Your Honor. Now the
9 only thing we need to do is find somebody to talk real fast.

10 THE COURT: Well --

11 (Laughter)

12 MR. LaTOUR: Your Honor, what is the scope of inquiry
13 of this examination?

14 THE COURT: I think the scope of inquiry is to
15 whether or not the estate has claims against Fifth Third,
16 right?

17 MR. LaTOUR: That's correct, Your Honor. The estate
18 has claims.

19 THE COURT: Right.

20 MR. LaTOUR: Not whether First Bank has claims. Not
21 whether Superior has claims. The estate. And I'm going to
22 urge that that's the limitation that this --

23 THE COURT: That's the --

24 MR. LaTOUR: -- examination sticks with.

25 THE COURT: -- that is the subject matter of the 2004

1 is whether the estate has claims. And if the trustee -- if
2 special counsel wants to allow another creditor to ask some
3 questions, they can do that. But that's going to take away
4 your time to ask, Mr. White, you understand that?

5 MR. WHITE: Understood.

6 THE COURT: Anything else this morning? We're
7 adjourned.

8 * * * * *

9 C E R T I F I C A T I O N

10 We, ANNEMARIE DeANGELO and JANET D. PERSONS, court
11 approved transcribers, certify that the foregoing is a correct
12 transcript from the official electronic sound recording of the
13 proceedings in the above-entitled matter, and to the best of
14 our ability.

15
16 /s/ Annemarie DeAngelo

17 ANNEMARIE DeANGELO

18
19 /s/ Janet D. Persons

20 JANET D. PERSONS

21 J&J COURT TRANSCRIBERS, INC. DATE: February 24, 2012

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